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Abnormal Mental State Mitigations of Murder – The U.S. Perspective

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Abstract

This paper examines the U.S. doctrines that allow an offender's abnormal mental state to reduce murder to manslaughter. First, the modern doctrine of "extreme emotional disturbance," as in Model Penal Code Section 210.3(1)(b), mitigates to manslaughter what otherwise would be murder when the killing "is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." While most American jurisdictions are based upon the Mode Code, this is an area in which many states chose to retain their more narrow common law "provocation" mitigation. Second, the modern doctrine of "mental illness negating an offense element," as in Model Penal Code Section 4.02, allows a killing to be mitigated to manslaughter (or less) upon a showing that a mental disease or defect negated the culpable state of mind required for murder. This Model Code provision too has met with some resistance among the states, many of whom limit the use of mental illness evidence to negate an offense element.

The paper discusses the state of the law in the various American jurisdictions, the reasons for the Model Penal Code shift from the common law, the possible reasons for resistence among the states to following that shift, an analysis of the mitigations under alternative distributive principles for punishment, concluding that only a desert principle supports the mitigations, and a discussion of the implications of this desert foundation for the proper formulation of the mitigations.

ABNORMAL MENTAL STATE MITIGATIONS OF MURDER – THE U.S. PERSPECTIVE

Paul H. Robinson*

Homicide grading statutes in the United States typically operate according to a single paradigm: grading corresponds to the offender's state of mind at the time that he causes the death of his victim. In particular, statutes typically require the factfinder to look to the offender's state of mind *as to causing the victim's death*. An actor who purposefully or knowingly causes death typically commits murder, while one who recklessly causes death commits the lesser offense of manslaughter (and one who negligently causes death commits the still-lesser offense of negligent homicide).[1] These four culpability terms—purposeful, knowing, reckless, and negligent— are the central features of homicide grading and are defined with some detail in most American criminal codes.[2]

Two doctrines that mitigate intentional (purposeful or knowing) killing from murder to manslaughter arise from the actor having some abnormal mental state, either transient or long-term. They are the subject of this paper. In the modern view, the first doctrine, typically referred

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[1] In most jurisdictions, this broad scheme was drawn from Model Penal Code Art. 210.

[2] The definitions typically track those of Model Penal Code §2.02(2).

to as the doctrine of "extreme emotional disturbance," mitigates murder to manslaughter when an intentional killing "is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."[3]

The second doctrine, most accurately described as "mental illness negating an offense element" but sometimes misleadingly referred to by the terms "diminished capacity" or "partial responsibility," allows a mitigation from murder if the actor is suffering from a mental disease or defect that has such an effect as to make it impossible for him to have the purpose or knowledge as to causing death that is required for murder.[4] The actor may have liability for a lesser offense, such as manslaughter, but only if the effect of his mental illness is such that he has the reckless culpability required for that lesser offense. Some mental illness may have the effect of negating even the recklessness required for manslaughter.

A different kind of mitigation based upon mental illness – one that functions as a partial insanity defense (and thereby properly deserves the labels "diminished capacity" or "partial responsibility") mitigate liability upon presentation of evidence that mental illness influenced the killing (rather than completely excused it). This form of homicide mitigation is generally no longer recognized in the United States.

This paper reviews the existence and several variations of these mitigations under current U.S. law, how they came to their present form, and what rationales one can offer in support of such mitigations.

I. The Model Penal Code Reform of Common Law Rules

Most of current American homicide law is based in significant part on the American Law Institute's Model Penal Code.[5] Starting even before its formal adoption in 1962, the Model Code has served as a basis for wholesale replacement of existing criminal law in almost three-quarters of the states.[6] Some states have adopted the Code with only minor revision, while others have kept much of their existing doctrine but codified it in the style, structure, and language of the

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[3] E.g., MPC §210.3(1)(b).

[4] E.g., MPC §4.02(1).

[5] The American Law Institute, which drafted the Code, is a nongovernmental, broad-based, highly regarded group of lawyers, judges, professors, and others who undertake research and drafting projects designed to make American law more rational, sensible, and effective. After nine years of work and a series of Tentative Drafts, the ALI approved an Official Draft in 1962. The original commentary, which was contained in the various Tentative Drafts, was consolidated, revised, and republished with the 1962 text in 1980 and 1985 as a seven-volume set. Three volumes containing Part II of the Model Penal Code, Definition of Specific Crimes, with revised comments were published in 1980. Three additional volumes containing Part I of the Code, General Provisions, with revised Comments, were published in 1985. An official version of the completed text of the Model Penal Code was published in 1985.

[6] MPC Commentaries Part I foreword at xi.

Model Code. A full understanding of current American homicide law requires an appreciation of how and why the Model Code drafters changed the previously existing common law rules.

A. Provocation and Extreme Emotional Disturbance

The American common law doctrine of provocation mitigated intentional killings from murder to manslaughter — specifically, to what was commonly termed "voluntary manslaughter" — if the killer was "provoked" into committing the crime. The mitigation reflected the view that passion frequently obscures reason and in some limited way renders the provoked intentional killer less blameworthy than the unprovoked intentional killer. At the time of the Model Penal Code, few jurisdictions had codified doctrines of provocation. Most relied upon common law. The few statutory formulations that existed simply codified the common law rules.[7]

The American common law mitigation had demanding standards. Typically, the provocation had to be "reasonable," in the sense that a reasonable person would have been similarly provoked. An early Twentieth Century court described the doctrine this way, and this was a common formulation confronting the Model Penal Code drafters:

> The doctrine of mitigation is briefly this: That if the act of killing, though intentional, be committed under the influence of sudden, intense anger, or heat of blood, obscuring the reason, produced by an adequate or reasonable provocation, and before sufficient time has elapsed for the blood to cool and reason to reassert itself, so that the killing is the result of temporary excitement rather than of wickedness of heart or innate recklessness of disposition, then the law, recognizing the standard of human conduct as that of the ordinary or average man, regards the offense so committed as of less heinous character than premeditated or deliberate murder. Measured as it must be by the conduct of the average man, what constitutes adequate cause is incapable of exact definition . . . .[8]

One significant aspect of the rule was the requirement that the actor must not have had time to "cool off"; he lost the mitigation if sufficient time passed for "the blood to cool and reason to reassert itself." The manslaughter mitigation was thus often described as covering killings that occur in the "heat of passion."

The American common law doctrine had several additional specific limitations. For one, the person killed must be the person who created the provocation. Early forms of the mitigation also required the provoking incident to have occurred in the presence of the defendant. Finally, only certain common types of provoking situations would typically make the mitigation available: "extreme assault or battery upon the defendant; mutual combat; defendant's illegal arrest; injury or serious abuse of a close relative of the defendant's; on the sudden discovery of a

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[7] Model Penal Code Official Comment to §210.3 at 45 (1985).

[8] State v. Gounagias, 88 Wash. 304, 311-12, 53 P. 9, 11-12 (1915), discussed infra, text at note 62.

spouse's adultery."[9] Even where the mitigation was not explicitly limited to specific types of provoking situation, certain events were often held inadequate, as a matter of law, to support the mitigation.[10] For example, it was common to hold that "mere words" were insufficient to support a mitigation,[11] even if the words described an incident (such as adultery, or harm to a relative) that would itself count as sufficient provocation if the defendant had witnessed it personally.[12]

It may seem unrealistic or even inappropriate for the provocation mitigation to apply a purely objective test, at least if the test asks whether a reasonable person would have acted in the same way as the defendant did. If the defendant's killing satisfies such a test — if a reasonable person would have acted in same way in the same situation — then one could argue that the defendant ought to be held to be entirely without blame. It is likely more accurate to say that the American common law mitigation meant to assess whether the actor's conduct was *reasonable* only in the sense that it was *understandable*. In other words, the mitigation was meant to cover cases where the killing remained condemnable, but the conditions of the killing suggested that the actor was *noticeably less blameworthy* than one who killed without such provocation. However, the common law restrictions failed to make a full assessment of the actor's blameworthiness and by their rigidity made the mitigation unavailable to many actors whose killings would seem considerably less blameworthy than the paradigmatic intentional murder.

Modern American codes that follow the Model Penal Code typically give a broader mitigation than the common law provocation doctrine. The Code's manslaughter mitigation applies where:

> murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation

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[9] Girouard v. State, 321 Md. 532, 583 A.2d 718 (Md. Ct. App. 1991). Indeed, sometimes cases falling within these categories have been treated as if they provided adequate provocation as a matter of law. See, e.g., State v. Thornton, 730 S.W.2d 309 (Tenn. 1987) (previously well-behaved husband discovers wife committing adultery in bedroom of their home, shoots other man, who dies from wounds; appellate court reverses murder conviction, calling it "a classic case of voluntary manslaughter," explaining that in "our opinion the passions of any reasonable person would have been inflamed and intensely aroused by this sort of discovery").

[10] See, e.g., State v. Hockett, 70 Iowa 442, 30 N.W. 742 (1886) (sexual relations between the victim and the defendant's sister is insufficient provocation); State v. Kotovsky, 74 Mo. 247 (1881) (a woman's refusal to go to St. Louis fairgrounds is inadequate provocation); State v. Hoyt, 13 Minn. 132 (1868) (driving of defendant's cattle off the road by victim is not sufficient provocation).

[11] See, e.g., People v. Murback, 64 Cal. 369, 30 P. 608 (1883) ("words of reproach" are not sufficient provocation regardless of their grievousness).

[12] See Corpus Juris Secundum, Homicide §122. These rules hint that, notwithstanding its asserted focus on the actor's state of mind, the common law mitigation may have approached provocation as a partial justification of sorts, where the objective circumstances of the killing are such as to reduce its overall harmfulness or wrongfulness.

> or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.[13]

This formulation of the mitigation has two components. First, the killing must have been committed "under the influence of extreme mental or emotional disturbance." A defendant will not be eligible for the mitigation if he did not personally suffer such a disturbance or if the disturbance did not drive or dictate his act, even if the circumstances would have created such a disturbance in most other people and would have driven them to violence. Second, there must be a "reasonable explanation or excuse" for the disturbance. No mitigation is available if the disturbance has no reasonable basis or is peculiar to the actor.[14]

The Model Code broadens the American common law mitigation in several important respects. Unlike the common law rules, it does not explicitly require, or exclude, particular situations; there are no conditions that are inadequate as a matter of law to provide a mitigation. It also drops the common law rule barring the mitigation if the killing occurs some period of time after the provoking event. In other words, the Code postulates that an actor's emotional disturbance does not necessarily decrease with time; indeed, it might increase.[15] Further, nothing in the Code's mitigation limits it to cases where the actor kills the source of the provocation, as the common law does. The Code's position is that if the actor's killing is less blameworthy by virtue of the influencing conditions, then such reduced blameworthiness exists no matter who is killed. Indeed, the Code does not even require a provocation as such; the relevant "disturbance" may arise from any source so long as it satisfies the rule's requirements.

The Model Penal Code mitigation uses a "reasonableness" standard, as the common law doctrine does, but instead of adopting a purely objective understanding of reasonableness, the modern rules allow a partial individualization of the standard by requiring that the reasonableness of the explanation or excuse be determined "under the circumstances as [the actor] believes them to be" and "from the viewpoint of a person in the actor's situation." These two phrases provide significant opportunities for a court, or jury, to take account of the particular characteristics of the defendant and the specific conditions in which the defendant acted. (The same two phrases are used in the Code's definitions of recklessness and negligence to achieve the same partial individualization of the reasonable person standard.[16]) The Code's drafters intended the second

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[13] Model Penal Code §210.3(1)(b). For the Code drafters' discussion of their formulation and how it changes then-existing common law, see Model Penal Code §210.3 comment at 53-65.

[14] See, e.g., People v. Casassa, 49 N.Y.2d 668, 404 N.E.2d 1310 (N.Y. 1980) (trial court found defendant acted under required disturbance but no reasonable explanation or excuse for it, thus denied mitigation; affirmed on appeal).

[15] Model Penal Code §210.3 cmt. at 48 (Tent. Draft No. 9, 1959).

[16] Model Penal Code §2.02(2)(c)&(d). For further discussion of these phrases in the context of culpability definitions, see Paul H. Robinson, Criminal Law §4.3 (Aspen 1997) [hereinafter Robinson, Criminal Law].

phrase— in particular "in the actor's *situation*" — to permit a trial judge great leeway in this partially individualization.[17]

The most difficult aspect in applying this aspect of the modern "extreme emotional disturbance" mitigation is in determining which characteristics of the defendant should be used in judging the reasonableness of the defendant's conduct. Clearly such things as an actor's age may be relevant in assessing the reasonableness of his disturbance. But, presumably, a defendant's certifiably bad temper would not be a basis for lowering our expectations of him with respect to engaging in violent behavior. He is not to be judged against the standard of the "reasonable bad-tempered person," for having an improperly short fuse might be exactly what makes his behavior seem unreasonable and blameworthy. To fully individualize the objective standard would turn it into a purely subjective standard, which would give mitigations where the community would see no reduced blameworthiness. More difficult to deal with are factors like a claim of a genetic predisposition to a violent reaction when provoked. If true, should it alter the standard by which the actor is judged? We are inclined to believe that people can, and must, control their tempers, but the claim of genetic predisposition clouds the issue by making it seem that the actor may lack such an ability through no fault of his own.[18] Unfortunately, criminal law theory has yet to develop a clear principle that will distinguish those characteristics that are properly included from those that are properly excluded when individualizing the reasonable-person standard. The Model Penal Code leaves the issue to the *ad hoc* determination of the trial judge.[19] (The analogous problem arises when the same partial-individualization device is used in the definitions of negligence and recklessness.[20])

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[17] As the Model Penal Code commentary explains,

> [t]here is an inevitable ambiguity in "situation." If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all its objectivity. The code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.

Model Penal Code §2.02 cmt. 4 at 242 (1985). See also id. at n.27 (noting that a similar problem exists with recklessness, and that discriminations similar to those required by the negligence standard must be made).

[18] If genetics create only a *predisposition* toward violence, it would seem that the actor retains the ability to control his conduct. If genetics are to be relevant, the actor must show that the influence of genetics on his conduct is sufficiently strong that we should see him as less blameworthy. For a related discussion in the context of the requirements of excuse defenses, see Robinson, Criminal Law §§9.1, 9.4.

[19] See Model Penal Code §210.3 cmt. at 63 (1980).

[20] For a discussion, see Robinson, Criminal Law §4.3.

B. Mental Illness Negating an Offense Element

The second doctrine that can mitigate murder is based upon the mental illness of the actor at the time of the offense. The mitigation can come in two forms. First, the actor's mental illness may negate (make it impossible to prove that the actor had) a culpable state of mind required by the offense definition, in this instance the purpose or knowledge as to causing death required for murder. As noted, the labels *diminished capacity* or *partial responsibility* are sometimes applied to this mitigation, but such use is misleading because it suggests a kind of partial insanity defense, as if a mitigation is given because the actor suffers some degree of mental illness short of that required for a full insanity defense. That is not an accurate description of the doctrine. The doctrine applies when an actor's mental illness *negates a culpable state of mind* required for the offense charged. It looks not to the actor's general capacity to function or to his degree of responsibility for his conduct in some general sense, but only to the specific issue of whether he has the carefully defined culpable state of mind contained in the offense definition for murder: purpose or knowing as to causing death.

Indeed, mental illness negating an element is not a doctrine of mitigation at all, but rather a claim that the defendant plainly does not satisfy the elements of murder. It is simply an absent element defense, like an actor's mistake negating an required offense culpability element.[21] Depending on whether the offense charged has lesser included offenses with lower culpability requirements, and depending on the actual effect of an actor's mental illness in negating the culpability elements of the lesser offenses, the doctrine may provide only a slight mitigation or it may provide a complete defense.

Model Penal Code section 4.02(1) states the modern form of the doctrine:

> Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.

Unlike the insanity defense, the actor's general mental capacity or incapacity is not the issue.[22] Impaired ability to control one's conduct, in particular, is not relevant here, because only cognitive dysfunctions can negate an offense culpable state of mind. Such is the nature of the requirements of purpose, knowing, recklessness, and negligence.[23] Mental illness that impairs an actor's ability to control his or her conduct is unlikely to negate offense culpability requirements, which typically concern specific cognitive functioning (e.g., being aware of facts or consequences) rather than matters of control. Typically, only cognitive dysfunction will cause an actor not to know the nature, circumstances, or potential consequences of his or her conduct, and therefore not satisfy a culpability element. (Where an actor's mental illness does not negate a

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[21] For further discussion of the concept of an absent-element defense and its distinction from "true" general defenses, see Robinson, Criminal Law §8.0.

[22] Compare Model Penal Code §4.02(1) to §4.01(1).

[23] See Model Penal Code §2.02(2).

required element, the actor nonetheless may have a general defense if he or she satisfies the conditions of a general insanity excuse.[24])

While this is the Model Code's approach, the original doctrine in American common law and was to *prevent* an actor from using evidence of mental illness to negate a required culpable state of mind.[25] The earlier law treated mental illness negating an offense element as analogous to the doctrine of voluntary intoxication, according to which the required but absent culpability is imputed to the actor if the actor voluntarily intoxicated himself. The analogy to mental illness is flawed, obviously. The imputation of culpability may well be justified in the context of voluntary intoxication; the actor has culpably caused his own intoxication and that culpability ought to be taken into account.[26] While one may question some aspects of this rationale for imputing culpability,[27] it provides at least the semblance of a rational reason. No similar claim can be made in the context of mental illness negating an offense element. An actor is rarely accountable for causing his own mental disease or defect. What, then, is the rationale for treating the mentally ill actor as if he has a required culpability when he does not? As with all doctrines of imputation — treating an actor as if he has a culpable state of mind that he in fact does not have — imputation itself is not objectionable, but may become so if not adequately justified.[28]

During the debates on the issue, one form of attack on the use of mental illness evidence to negate an offense element was to claim incompatibility between behavioral science and criminal law. It was argued, for example, that behavioral science admits of gradations of responsibility while the criminal law does not; it must decide to impose liability or not.[29] But this argument rests upon a mistaken view of the diminished capacity defense as somehow assessing partial liability for partial responsibility. As noted above, the actor's mental illness either negates an offense element or it does not; it does not ask the criminal law to admit of gradations. More importantly, this argument seems out of place when discussing a grading doctrine, such as murder mitigations to manslaughter, rather than a liability doctrine. The function of murder mitigations is not one of determining whether there will be liability but rather whether there should be a lower grade of liability than there is for the paradigm intentional killing.

Another argument was that the behavioral sciences were not yet sophisticated enough for the criminal law to rely upon them. A similar argument stressed the tendency of the diminished

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[24] See Robinson, Criminal Law §9.3.

[25] See Part II.B infra; Robinson, Criminal Law §4.5, "Limiting the culpability that may be negated."

[26] E.g., Model Penal Code §2.08(2).

[27] For a discussion of how and why the justification is not entirely accurate, see Robinson, Criminal Law §5.3, "Common law vs. Model Penal Code rule."

[28] See Robinson, Criminal Law §III.1 (Principles of Imputation: Introduction).

[29] See Bethea v. United States, 365 A.2d 64, 68 (D.C. 1976). Following an argument with his estranged wife, defendant shot her five times at close range; at trial defendant claimed at the time of the shooting his mental condition was such as to preclude a finding of "sound memory and discretion" and "deliberate and premeditated malice" as required for the offense.

capacity doctrine to take "full decision-making authority" from the jury and shift it to the expert witness.[30] But what is asked by the modern doctrine is not to have criminal law rely on behavioral science; what is asked is that juries be given access to such evidence along with all other relevant evidence, so that the *jury* can decide whether the required offense mental element is present. The jury has full authority to reject or give little weight to any or all psychiatric evidence (and is particularly likely to do so where psychiatrists disagree, as frequently occurs).[31]

Another challenge to allowing mental illness to negate culpability focused on the nature of culpability. Culpability is a legal concept, not a scientific one. Thus, it was argued, it must necessarily be decided on an objective standard. And, application of an objective standard means that personal abnormalities cannot be taken into account.[32] While this view of culpability might have been true at early common law, it does not accurately describe the nature of current doctrine. It is true that an actor's state of mind cannot be known directly, and it is true that a culpable state of mind must be proven by objective evidence. This does not imply an objective standard for culpability, however. Current law rejects such common law rules as the presumption that "an actor intends the natural and probable consequences of his conduct."[33] It requires instead a finding by the jury that, based on all the evidence, the jury believes that the actor actually had the culpable state of mind required by the offense definition. The members of the jury may call upon their own life experiences in reaching their factual conclusions, including judgments about how people normally function. Still, the issue they are asked to decide is not whether the ordinary person would have had the required culpable state of mind, but rather whether this defendant actually did have it.

One final argument, perhaps the most persuasive argument against permitting mental illness to negate an element, focuses on the need to protect society from the mentally ill people who commit crimes. We must bar the defense of diminished capacity because such dangerous people must be convicted of something in order to provide authority for incarceration or treatment or whatever else is necessary to prevent them from causing further harm. Further, the danger to the public in permitting such a defense is particularly high because everyone who commits a brutal offense is, to some extent, mentally abnormal, so allowing the defense would frustrate the needed criminal law authority over just the people from whom we most need to protect ourselves. But, even if it were true that those who commit brutal offenses are mentally

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[30] Id. at 89.

[31] For an example of the counterarguments, see the court's opinion in *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

[32] Id. at 1002.

[33] See, e.g., Regina v. Wallett, [1968] All E.R. 296 (Criminal Justice Act of 1967 excluded common law presumption; jury instruction on ordinary person standard for determining intent in murder case was in violation of Act; murder conviction reduced to manslaughter); Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (jury instruction in accordance with common law presumption had effect of either conclusive presumption of intent or shift of burden of persuasion, and therefore unconstitutional because violates Fourteenth Amendment requirement that State prove every offense element beyond reasonable doubt).

abnormal, it does not follow that all such persons would get a defense under the Model Code formulation. Only those who are mentally ill and, as a result, do not have a *required offense element,* get a defense for mental illness negating an element. Further, "mental illness" typically is defined expressly to exclude abnormality manifested only by anti-social conduct.[34]

Most important, the proper way to protect ourselves from dangerous mentally ill people is not through distortion of the criminal law system by having it convict blameless offenders, but rather through providing an effective system for civil commitment of the dangerously mentally ill. As social science has recently shown, punishing people who are seen as morally blameless undermines the criminal law's moral credibility with the community it governs, and thereby undermines its crime-control effectiveness in harnessing the powerful forces of social influence and internalized norms.[35] (Note that this protection-of-the-public line of argument would call for abolition of not only the use of mental illness negating an element, but also of the insanity defense.)

C. "Diminished Capacity" or "Partial Responsibility"

There have been attempts by some American courts – but no legislatures – to create a true "diminished capacity" or "partial responsibility" mitigation, one that would mitigate an intentional killing to manslaughter based upon reduced responsibility because of an actor's reduced capacity due to mental illness. While the actor would not qualify for a complete insanity defense, it is argued that he ought to get at least a partial insanity mitigation of his mental illness is such that his capacity to fully appreciate or control his conduct is diminished to an extent that makes him noticeably less blameworthy than an intentional killer not suffering similar mental illness. The Model Penal Code rejected such a mitigation.[36]

The attempts to create such a mitigation occurred in older cases in which courts were interpreting the common law "malice aforethought" requirement for murder, and saw themselves as having the authority, or at least the flexibility in interpretation, to define malice aforethought so as to exclude such cases of "diminished capacity." Manslaughter liability would result because, at common law, that offense commonly was defined as a catchall comprised of "all other killings" that were not murder and not justified or excused.[37] Such an approach is no longer possible in a Model Penal Code jurisdiction because manslaughter is a defined offense, with specific requirements.

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[34] See Model Penal Code §4.01(2).

[35] See Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 Harv. L. Rev. 1429 (2001); Paul H. Robinson, Geoff Goodwin, and Michael Reisig, The Disutility of Injustice, 85 N.Y.U. L. Rev. (forthcoming 2010) [hereinafter Robinson et al., Disutility]; Paul Robinson, Distributive Principles of Criminal Law: Who Should Be Punished How Much? chs. 6 & 8 (Oxford 2008).

[36] See Model Penal Code comment §210.3 at 67-73.

[37] See, e.g., Model Penal Code comment §210.3 at 44-48.

The five cases that sought to create such a mitigation were all pre-codification.[38] Four of the five – Hawaii, Ohio, Oregon, and Utah – are all now Model Penal Code jurisdictions, which typically abolish the common law,[39] and therefore provide no diminished capacity mitigation—or any other—unless it is explicitly included in their codified homicide scheme.[40] The fifth, a 1966 California case, *People v. Conley*, was repudiated by statute in 1981 when the California legislature abolished the state's diminished capacity defense.[41]

A form of the "diminished capacity" mitigation still exists in Model Penal Code jurisdictions, at least in a sense. Recall the previous Part I.A discussion of the modern mitigation of extreme emotional disturbance, which reduces murder to manslaughter. By its terms it applies to "extreme *mental or* emotional disturbance," which, thus, applies to an actor who suffers a disturbance due to mental illness. Recall also that the Model Code's formulation allows the judge to partially individualize the reasonable person standard against which the actor's conduct is compared. Thus, the judge might have the jury assess the conduct of a mentally ill offender by comparing it against that of a reasonable person suffering a mental illness similar to that of the actor. The Model Code drafters explicitly note this possibility in their official commentary.[42]

II. Current United States Rules

It is commonly difficult to state "the American rule" on an issue because there are 52 American jurisdictions.[43] (Federal criminal law applies only to special federal offenses, which typically concern only areas in which there is a special federal interest, such as organized crime involving several states. Under the U.S. Constitution, the police power is given to the states,[44] and state criminal codes govern the vast bulk of homicide prosecutions.) While more than three-

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[38] People v. Conley, 64 Cal.2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966); State v. Santiago, 55 Haw. 162, 516 P.2d 1256 (1973); State v. Nichols, 3 Ohio App.2d 182, 209 N.E.2d 750, 32 O.O.2d 271 (1965); State v. Scheigh, 210 Ore. 155, 310 P.2d 341 (1947); State v. Green, 78 Utah 580, 6 p.2d 177 (1931).

[39] E.g., Model Penal Code §1.05(1).

[40] See Haw. Rev. Stat. §701-102 (); Ohio Rev. Code Ann. §2901.03 (); Or. Rev. State §161.035 (); Utah Code Ann. §76-1-105 (West).

[41] See Cal. Penal Code §188 (West); People v. Bobo, 271 Cal. Rptr. 277, 290 (1990) (noting that the *Conley*'s diminished capacity mitigation of murder to manslaughter is no longer available).

[42] Model Penal Code §210.3 comment at 72-73.

[43] The 50 states, the District of Columbia, and the federal system each have their own criminal code.

[44] U.S. Constitution amend. X. See also Panhandle Eastern Pipe Line Co. v. State Highway Commission for Kansas, 294 U.S. 613, 622 (1935) (state's police power "springs from the obligation of the state to protect its citizens and provide for the safety and good order of society").

quarters of the state criminal codes are based upon the Model Penal Code, their provisions sometimes vary from those of the Model Code and the two homicide mitigations at issue here are examples of where such variance is common.

A. Provocation and Extreme Emotional Disturbance

It is no surprise that the seven states that never seriously considered enacting a modern comprehensive criminal code all adhere to some variation of the common law provocation mitigation: Idaho, Louisiana, Maryland, Mississippi, Nevada, North Carolina, and Wisconsin.[45] Nor is it a surprise that the 11 jurisdictions that contemplated comprehensive modern codification but never carried it out, similarly all rely upon some variation of the common law provocation mitigation: California, District of Columbia, Massachusetts, Michigan, Oklahoma, Rhode Island, South Carolina, Tennessee, Vermont, West Virginia, and the federal system.[46]

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[45] Idaho Code Ann. § 18-4006 ; La. Rev. Stat. Ann. § 14:31; Cox v. State, 534 A.2d 1333, 1335 (Md. 1988) ("We define voluntary manslaughter as an intentional homicide, done in a sudden heat of passion, caused by adequate provocation, before there has been a reasonable opportunity for the passion to cool."); Miss. Code. Ann. § 97-3-35; Nev. Rev. Stat. Ann. § 200.040; State v. Ligon, 420 S.E.2d 136, 146 (N.C. 1992) (holding that mitigation to voluntary manslaughter available only when there is evidence that "(1) defendant [killed victim] in the heat of passion; (2) this passion was provoked by acts of the victim which the law regards as adequate provocation; and (3) the [killing] took place immediately after the provocation"); State v. Williford, 307 N.W.2d 277, 283 (Wis. 1981) ("The heat of passion which will reduce what would otherwise be murder to manslaughter is such mental disturbance, caused by a reasonable, adequate provocation as would ordinarily so overcome and dominate or suspend the exercise of the judgment of an ordinary man as to render his mind for the time being deaf to the voice of reason.") (internal citations omitted).

[46] Cal. Penal Code § 192;High v. United States, 972 A.2d 829, 833 (D.C. 2009) ("Voluntary manslaughter is an unlawful, intentional killing that would be second-degree murder but for the presence of mitigating circumstances, which "exist where [the] person acts in the heat of passion caused by adequate provocation."); Commonwealth v. Burgess, 879 N.E.2d 63, 78 (Mass. 2008) ("The jury must be able to infer that a reasonable person would have become sufficiently provoked and that, in fact, the defendant was provoked. Furthermore, a verdict of voluntary manslaughter requires the trier of fact to conclude that there is a causal connection between the provocation, the heat of passion, and the killing.") (internal citations omitted); People v. Townes, 218 N.W.2d 136, 143 (Mich. 1974) ("A defendant properly convicted of voluntary manslaughter is a person who has acted out of a temporary excitement induced by an adequate provocation and not from the deliberation and reflection that marks the crime of murder."); Okla. Stat. Ann. tit. 21, § 711 (West 2002); State v. McGuy, 841 A.2d 1109, 1113 (R.I. 2003) ("[V]oluntary manslaughter exists when (1) the provocation is so gross as to cause the ordinary reasonable man to lose his [or her] self control and to use violence with fatal results,

(continued...)

Many if not most of the codification proposals in these jurisdictions proposed adopting the Model Penal Code "extreme emotional disturbance" formulation of the mitigation.

On the other hand, it is a bit surprising that, given the enormous influence of the Model Penal Code in most areas, in this area its influence has been quite limited. Of the 34 states that adopted modern comprehensive criminal codes inspired by the Model Penal Code,[47] only 11 of those codes adopt the Model Penal Code's "extreme emotional disturbance" formulation: Arkansas, Connecticut, Delaware, New York, Hawaii, Kentucky, Maine, Montana, North Dakota, Oregon, and Utah.[48] The remaining 23 Model Penal Code jurisdictions retained their previously existing common law provocation formulations or some variation on it: Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, South Dakota, Texas, Virginia, Washington, and Wyoming.[49]

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[46] (...continued)
and (2) the defendant is deprived of his self control under the stress of such provocation and committed the crime while so deprived.") (internal citations omitted); State v. Knoten, 555 S.E.2d 391, 394-95 (S.C. 2001) ("Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. . . The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter . . . must be such as would naturally disturb the sway of reason . . . and produce . . . an uncontrollable impulse to do violence.") (internal citations omitted); Tenn. Code Ann. § 39-13-211; State v. King, 897 A.2d 543, 548 (Vt. 2006) ("Heat-of-passion manslaughter, at issue here, requires: adequate provocation; inadequate time to regain self-control ('cool off'); actual provocation; and actual failure to cool off.") (internal citations omitted); State v. Morris, 95 S.E.2d 401, 408 (W. Va. 1956) ("A sudden intentional killing with a deadly weapon, by one who is not in any way at fault, in immediate resentment of a gross provocation, is prima facie a killing in heat of blood, and therefore, an offense of no higher degree than voluntary manslaughter."); 18 U.S.C.A. § 1112.

[47] See Model Penal Code and Commentaries (Official Draft and Revised Comments), Part I §§ 1.01 to 2.13, Foreword at xi (1985).

[48] Ark. Code Ann. § 5-10-104 (West); Conn. Gen. Stat. Ann. § 53a-55 (West); Del. Code Ann. tit. 11, § 641 (West); N.Y. Penal Law § 125.22 (McKinney 2009); Haw. Rev. Stat. Ann. § 707-702 (LexisNexis); Ky. Rev. Stat. Ann. § 507.030 (West); Me. Rev. Stat. Ann. tit. 17-A, § 203; Mont. Code Ann. 45-5-103; N.D. Cent. Code § 12.1-16-01(2); Or. Rev. Stat. Ann. § 163.118 (West); Utah Code Ann. § 76-5-205.5(1)(b) (West).

[49] Ala. Code § 13A-6-3; Alaska Stat. § 11.41.115 (West); Ariz. Rev. Stat. Ann. § 13-1103; Colo. Rev. Stat. Ann. § 18-3-103 (West); Fla. Stat. Ann. § 782.03 (West); Ga. Code Ann. § 16-5-2 (West); 720 ILCS 5/9-2; Ind. Code Ann. § 35-42-1-3 (West); Iowa Code Ann. § 707.4 (West); 2010 Kansas Laws Ch. 136 (H.B. 2668) New Sec. 39; Minn. Stat. Ann. § 609.20 (West); Mo. Rev. Stat. § 565.023 (?); Neb. Rev. St. § 28-305; N.H. Rev. Stat. Ann. § 630:2; N.J. Stat. Ann. § 2C:11-4 (West); N.M. Stat. Ann. § 30-2-3; Ohio Rev. Code Ann. § 2903.03; 18 Pa. Cons.
(continued...)

B. Mental Illness Negating an Offense Element

American jurisdictions take a variety of positions on the admission of mental disease or defect evidence offered to negate a required offense mental element. The most common position is that of the Model Penal Code. About 40 percent of jurisdictions follow the Code in admitting any evidence of mental disease or defect that is relevant to negate any culpable state of mind offense element. These include Alaska, Arkansas, Connecticut, Colorado, Hawaii, Idaho, Kentucky, Maine, Maryland, Missouri, Montana, Nevada, New Hampshire, New Jersey, Oregon, Tennessee, Utah, and Vermont.[50]

Another 30 percent allow such evidence to be admitted but purport to limit such admission to negating only a "specific intent" or, even more restrictively, to negate only the "malice" or "premeditation" requirements in murder prosecutions – concepts that have little meaning under the Model Penal Code's scheme. The "specific intent" jurisdictions include California, Iowa, Kansas, Michigan, New York, Pennsylvania, Rhode Island, South Dakota, and

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[49] (...continued)
Stat. Ann. § 2503 (West); S.D. Codified Laws § 22-16-15; Tex. Penal Code Ann. § 19.02(d) (Vernon); Barrett v. Commonwealth, 341 S.E.2d 190, 192 (Va. 1986) ("To reduce a homicide from murder to voluntary manslaughter, the killing must have been done in the heat of passion and upon reasonable provocation."); State v. Frederick, 579 P.2d 390, 394 (Wash. Ct. App. 1978) ("The rule of provocation has four requirements: (1) There must have been adequate or reasonable provocation. (2) The defendant must have been in fact provoked, and, if provoked, did not in fact cool off. (3) The circumstances are such that a reasonable person would not have cooled off. (4) There must have been a causal connection between the provocation, the heated passion, and the fatal act."); Wyo. Stat. Ann. § 6-2-105 (West).

[50] See Alaska Stat. §12.47.020 (Michie 2002); Ark. Code Ann. §5-2-303 (Michie 2002); State v. Burge, 487 A.2d 532 (Conn. 1985); Colo. Rev. Stat. Ann. §18-1-803 (West 2003); Haw. Rev. Stat. Ann. §704-401 (Michie 2002); Idaho Code §18-207 (Michie 2002); Robinson v. Commonwealth, 569 S.W.2d 183 (Ky. Ct. App. 1978); Me. Rev. Stat. Ann. tit. 17-A, §38 (West 2003); Hoey v. State, 536 A.2d 622 (Md. 1988); Mo. Ann. Stat. §552.030 (West 2002); Mont. Code Ann. §46-14-102 (2002); Finger v. State, 27 P.3d 66 (Nev. 2001) (finding abolition of insanity defense unconstitutional and holding that evidence not meeting legal insanity standard may be admitted at trial to negate an offense element); Novosel v. Helgemoe, 384 A.2d 124 (N.H. 1978) (applying only in bifurcated trials); N.J. Stat. Ann. §2C:4-2 (West 2002); Or. Rev. Stat. §161-300 (2001); State v. Perry, 13 S.W.3d 724 (Tenn. Crim. App. 1999); 2003 Utah Laws Ch. 11(making minor revisions to Utah Code Ann. §76-2-305 (2002)); State v. Smith, 396 A.2d 126 (Vt. 1978); United States v. Pohlot, 827 F.2d 889 (3d Cir. 1987) (holding that in codifying an insanity excuse, 18 U.S.C.A. §17 (West 2003), Congress abolished defenses of "diminished capacity" and "partial responsibility" but did not intend to preclude admission of psychiatric evidence relevant to negate an element of the offense).

Washington.[51] The even more restrictive "premeditation" jurisdictions include Illinois, Massachusetts, Nebraska, New Mexico, North Carolina, and Virginia.[52]

The final 30 percent purport to exclude the admission of mental illness evidence to negate any offense element. These most restrictive jurisdictions include Alabama, Arizona, Delaware, District of Columbia, Florida, Georgia, Indiana, Louisiana, Minnesota, Mississippi, Ohio, Oklahoma, South Carolina, Texas, West Virginia, and Wyoming.[53]

Some courts have concluded that barring the use of mental illness evidence to show the absence of a required offense element is unconstitutional.[54] This is said to follow from the cases holding that the state is constitutionally required to prove all elements of an offense beyond a reasonable doubt. Such a constitutional rule may be broader than is appropriate; it would seem to bar all forms of imputation of required offense elements. Many doctrines of imputation – such as the doctrine of complicity, which imputes the conduct of another – are well justified and

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[51] Cal. Penal Code §28 (West 2003); Veverka v. Cash, 318 N.W.2d 447 (Iowa 1982); State v. Dargatz, 614 P.2d 430 (Kan. 1980); People v. Atkins, 325 N.W.2d 38 (Mich. Ct. App. 1982); People v. Segal, 444 N.Y.S.2d 588 (N.Y. 1981); Commonwealth v. Walzack, 360 A.2d 914 (Pa. 1976); State v. Correra, 430 A.2d 1251 (R.I. 1981); State v. Huber, 356 N.W.2d 468 (S.D. 1984); State v. Bottrell, 14 P.3d 164 (Wash. App. 2000).

[52] People v. Leppert, 434 N.E.2d 21 (Ill. App. Ct. 1982) (considering defendant's claim that, due to mental defect, he lacked the requisite intent to attempt murder); Commonwealth v. Baldwin, 686 N.E.2d 1001 (Mass. 1997); Washington v. State, 85 N.W.2d 509 (Neb. 1957); State v. Beach, 699 P.2d115 (N.M. 1985); State v. Shank, 367 S.E.2d 639 (N.C. 1988); LeVasseur v. Commonwealth, 304 S.E.2d 202 (Va. 1979).

[53] Barnett v. State, 540 So. 2d 810 (Ala. Crim. App. 1988); State v. Schantz, 403 P.2d 521 (Ariz. 1965); Bates v. State, 386 A.2d 1139 (Del. 1978); Bethea v. United States, 365 A.2d 64 (D.C. 1976); Zamora v. State, 361 So. 2d 776 (Fla. Dist. Ct. App. 1978); Hudson v. State, 319 S.E.2d 28 (Ga. Ct. App. 1984); Brown v. State, 448 N.E.2d 10 (Ind. 1983); State v. Murray, 375 So. 2d 80 (La. 1979); State v. Bouwman, 328 N.W.2d 703 (Minn. 1982); Garcia v. State, 828 So. 2d 1279 (Miss. Ct. App. 2002); State v. Wilcox, 438 N.E.2d 523 (Ohio 1982); Gresham v. State, 489 P.2d 1355 (Okla. Crim. App. 1971); Gill v. State, 552 S.E.2d 26 (S.C. 2001); Warner v. State, 944 S.W.2d 812 (Tex. App. 1997); State v. Flint, 96 S.E.2d 677 (W.Va. 1957) (providing statement against diminished capacity defense which has since been questioned but not overruled, in State v. Simmon, 309 S.E.2d 89 (W. Va. 1983); Muench v. Israel, 715 F.2d 1124 (7th Cir. 1983) (finding that Wisconsin may constitutionally reject the diminished capacity defense and refuse to admit evidence proving defendant's inability to form requisite intent); Price v. State, 807 P.2d 909 (Wyo. 1991). To date, North Dakota courts have not explicitly spoken to this issue -- their position remains unclear.

[54] See, e.g., Hendershott v. People, 653 P.2d 385 (Colo. 1982) (denial of defendant's request to present mental impairment evidence to negate requisite culpability held violation of due process; exclusion of mental impairment evidence rendered prosecution's *mens rea* evidence uncontestable as matter of law and lessened prosecution's burden to something less than mandated by due process).

universally accepted. If there is to be a constitutional rule, it ought to focus instead upon the adequacy of the justification for the imputation.[55] Given the difficulty in showing a basis of blameworthiness of an actor whose mental illness negates an element, imputation of the negated element seems unwise. Whether the rejection of such bad policy ought to be enshrined as a constitutional rule is another matter.[56] In any case, the Supreme Court's 2006 decision in *Clark v. Arizona* holds that states are not required to allow admission of evidence of mental illness.[57]

C. The Special Resistance to the Reform of Homicide Requirements

The state of current law described in the subsections above present something of a puzzle. Why would the Model Penal Code be so enormously influential in so many areas yet see such resistance to its homicide mitigations? There are few other areas where its model has not been followed. One might be inclined to simply mark this off as an area of policy and theoretical dispute, but, interestingly, there is not large disagreement among scholars about the Model Code's homicide reforms. It seems that the resistance is primarily a legislative animal. Yet if legislatures were willing to defer to the Model Code in most other areas, why resist in this one?

The resistance to the Mode Code was in one direction – insisting on keeping the more narrow common law mitigations. One explanation for the resistance may be that homicide, especially intentional homicide, as the most serious offense, has special status in the politics of crime. And proposals for homicide *mitigations*, in particular, may draw special attention. What could be worse than supporting the "coddling of killers"? In the U.S., at least, crime politics has a special dynamic all its own. The charge of being "soft on crime" can be politically lethal and, thus, can heavily influence the public positions of even liberal politicians.

It is not necessarily the case that the politically popular crime legislation reflects community views about just deserts. The distorting effect of crime politics can be seen in a recent study that showed that the most politically popular crime-control doctrines of today – such as "three strikes" and other habitual offender statutes, abolition or serious narrowing of the insanity defense, adult prosecution of juveniles, the felony murder rule, strict liability for statutory rape, and high penalties for drug offenses – regularly and predictably produce sentences that conflict with the community's intuitions of justice.[58] In the context of homicide specifically, other research has shown the lay intuitions of justice do not support a felony murder rule and,

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[55] For a general discussion of the value and propriety of doctrines of imputation, see Robinson, Criminal Law §III.1.

[56] Recall the troublesome inflexibility created by the constitutionalization of the rule that the state ought to bear the burden of proof on offense elements, as in encouraging strict liability rather than a rebuttable presumption of negligence. See Robinson, Criminal Law §2.7, "Mandatory presumptions."

[57] Clark v. Arizona, 126 S.Ct. 2709 (2006)

[58] For a fuller account of the study, see Robinson et al., Disutility, supra note 35, at [Parts II and III].

indeed, do support the Model Code's partial individualization of the reasonable person standard.[59]

While many of these doctrines have rational crime-control underpinnings, it is nonetheless interesting, if not odd, that they could be so readily and widely enacted despite their tendency to predicably and regularly produce what the community apparently sees as injustice. How can a democratic process produce liability rules that the community sees as unjust? As has been argued elsewhere,[60] one can point to a number of factors that work together to cause such results. The influence of the media in shaping public opinion often causes people to profess opinions that they would not hold if given all of the information in any particular case. People's generalization of crime opinions, and their construction of crime archetypes upon which they base their sentencing judgments, often simplify their thinking to the point that because only the worst crimes are reported and come to mind, they, when polled, often want to impose only the worst punishments. As such, any particular legislator can look to this flawed public opinion and conclude that the majority support harsher crime laws, when in fact they do not. Moreover, the democratic process on the whole tends to invite harsh punishment laws. The media's crime reporting is often based on information provided by the government – and it has been shown that public concern about crime often *follows* legislative consideration of crime issues, rather than being the cause of said action. Additionally, the legislators' self-preservation interest dictates that they not put themselves in a position that could be vulnerable to attack by a rival – a situation that is often brought about by advocating sentencing reduction or opposing harsher penalties, even if such reforms would be in accord with lay intuitions of justice (empirical desert).

It may well be that these same dynamics help explain why the Model Penal Code's intentional homicide mitigations stand out as having faced surprising resistance to reform among the states, even those states heavily influenced by the Model Code in most other areas.

III. Underlying Rationales and their Implications for Reform

The previous sections describe current American law regarding the murder mitigations and how they came to be as they are. What can one say about whether and how the mitigations should be formulated? Section A below considers which distributive principles of criminal liability and punishment would support each of the two mitigations and which would not. It concludes that only a desert distributive principle seems to offer support. This desert basis for the mitigations has implications for how they should be formulated, as discussed in Section B.

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[59] Paul H. Robinson & John M. Darley, Justice, Liability & Blame: Community Views and the Criminal Law, studies 11, 16 (pages 116-122, 169-180) (1995).

[60] For a fuller discussion of the issue, see Robinson et al., Disutility, supra note 35, at [Part IV]

A. The Mitigations under Alternative Distributive Principles: A Desert Foundation

As with any criminal law rule, the proper formulation of the two mitigation doctrines, or even their existence, depends in large part on the system's distributive criteria for criminal liability and punishment. Different distributive principles produce quite different liability and punishment rules, and those different rules commonly conflict with one another. To advance one distributive principle by adopting the rule supported by that principle, it is commonly necessary to undermine the effective operation of an alternative distributive purpose.[61]

If one were to rely upon efficient deterrence as one's distributive principle, either special or general deterrence, it would seem unwise to give a mitigation in the circumstances in which these two doctrines do. Where an event provokes an actor to commit an offense, the law's deterrent threat must, if anything, increase, not decrease – yet the existence of the mitigations promise the possibility of reduced (or no) liability. Where the circumstances of the mitigation involve a cognitive failure and irrational thinking by the actor, a distributive principle of special deterrence might tolerate the mitigation, but not one of general deterrence. Potential offenders need to be told beforehand that when things get difficult they nonetheless must remain law-abiding, that there is no hope for them to avoid liability or to gain a mitigation because of the provoking or challenging circumstances, thus they must struggle to remain law-abiding even if they are highly tempted to break the law.

Similarly, if one were to rely upon a distributive principle of either rehabilitation or incapacitation of the dangerous, it would be counterproductive to provide either of these mitigations. To the extent that the provoking circumstances, the defendant's emotional reaction to them, or the defendant's longer-term mental disease or defect played a role in bringing about his offense conduct, either a rehabilitative or an incapacitation distributive principle would want to take control of the offender to assure its authority to rehabilitate or incapacitate. This is especially true where the circumstances or characteristics are long term or predictably recurring.

Contrast these conclusions with an analysis of the two mitigations under a distributive principle of desert. The conditions of the mitigations seem well designed to identify those cases where the actor has noticeably less moral blameworthiness for the killing than the paradigm case of an intentional killing without the mitigation. This is particularly true of the struggles to formulate a proper reasonable person test. The point of the exercise – and the terms of the debate – commonly focus around what formulation best captures the offender's true blameworthiness, given his obligation to abide by society's norms.

B. Implications for Reform

What implications for reform follow from the unsurprising conclusion that the two mitigations are desert based? That conclusion focuses the reform inquiry on this question: What formulation of the doctrines best (most reliably and most accurately) sorts offenders into two groups of distinguishable blameworthiness? An ideal formulation would be one that marks out

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[61] For a general discussion, see Paul H. Robinson, Distributive Principles of Criminal Law: Who Should Be Punished How Much? ch. 2 (Oxford 2008).

for mitigation those cases where the offenders getting the mitigation are all less blameworthy than all those offenders who do not qualify for it.

1. The Model Code Mitigations Should Be Preferred Because They Better Track Offender Blameworthiness Than the Common Law Formulations. What decisional criteria for the mitigations would be most accurate and reliable in assessing relative blameworthiness? Ideally all of the cases that remain in the unmitigated group should be more blameworthy than all of the cases in the mitigated group. In that respect, the Model Penal Code drafters would certainly argue that the common law provocation mitigation is unreliable and that the Code's extreme emotional disturbance mitigation should be preferred. In particular, the Code drafters would argue that many of the offenders who would be excluded from the common law mitigation by virtue of its many limitations (yet who would be included in the extreme emotional disturbance mitigation) are offenders of importantly less blameworthiness. For example, the Model Code drafters seemed particularly disapproving of cases like *People v. Gounagias,*[62] in which the deceased committed sodomy on the unconscious defendant and subsequently spread the news of his accomplishment. Those who learned of the event taunted and ridiculed the defendant until he finally lost control and shot his assailant some two weeks after the forcible sodomy.[63] It would seem hard to dispute that Gounagias was meaningfully less blameworthy than the paradigm case of an intentional killing, yet the common law formulation would fail to distinguish the two, while the Model Code formulation would.

2. The Partial Insanity Mitigation Should Be Reconsidered. Another implication of the desert basis for the mitigations concerns the partial insanity mitigation that was rejected by the Model Penal Code drafters.[64] The drafters concede in their official commentary that such a partial insanity mitigation – in this form, the mitigation is accurately described by the labels "diminished capacity" or "partial responsibility" – would be appropriate on purely desert grounds. They reject it because they see it as undermining the goal of incapacitating dangerous offenders.[65]

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[62] 88 Wash. 304, 153 P. 9 (1915). The drafters discuss the case at Model Penal Code §210.3 comment 59-60 (1980).

[63] The court rejected the defendant's theory that the cumulative effect of reminders of former wrongs could support a sudden passion and allow mitigation and held that the passage of time precluded the original act of forcible sodomy from being a basis for mitigation.

[64] Discussed in Part I.C supra.

[65] Model Penal Code §210.3 comment at 71 – 72. The drafters explain:

> [Diminished responsibility] looks into the actor's mind to see whether he should be judged by a lesser standard than that applicable to ordinary men. It recognizes the defendant's own mental disorder or emotional instability as a basis for partially excusing his conduct. This position undoubtedly achieves a closer relation between criminal liability and moral guilt. Moral condemnation must be founded, at least in part, on some perception of the capacities and limitations of the individual actor. To the extent that the

(continued...)

However, if one were willing to promote incapacitation of the dangerous at the expense of desert, then there would be little reason to recognize any such provocation mitigation, as noted above, and certainly not the Model Code's broad extreme emotional disturbance mitigation. The Model Code drafters would seem to be some what internally inconsistent here when they reject the partial insanity mitigation on incapacitation grounds..

Perhaps more importantly, the American Law Institute recently amended the Model Penal Code for the first time since its promulgation in 1962, and the primary thrust of that amendment is to reject the Code's earlier distributive principles for criminal punishment. The Code's original Section 1.02(2) purported to allow some sort of balancing of competing distributive principles. The new Section 1.02(2) sets desert as the dominant principle and prohibits reliance upon the other distributive principles to the extent that such would violate the demands of desert.[66] If this had been the Code's distributive principle at the time of its initial promulgation, the drafters presumably would not have so clearly rejected a partial insanity mitigation.

3. The Mitigations Should Be Made Available Beyond Murder, If Practicable. A final reform question asks whether the mitigations at issue should be applied beyond the homicide offense. First, note that the mitigation that arises from mental illness negating an element, under Model Penal Code Section 4.02(2), already applies to all offenses, not just homicide. The jurisdictions that deviate from the Code and attempt to limit the admissibility of evidence of mental illness to negate an offense element most commonly allow it to negate the culpability required for murder or first degree murder. Thus, the arguments summarized above suggesting that this is an indefensible position and that the Model Penal Code position should be much preferred,[67] are essentially arguments for why this form of "mitigation" should indeed be available for all offenses, not just homicide.

Should the extreme emotional disturbance mitigation (and the partial insanity "diminished capacity" mitigation, if one were recognized) be applied beyond homicide offenses? It seems hard to think of principled reasons for why they should not be. To the extent that they rely upon general criteria that reliably distinguish less blameworthy offenders from more

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[65] (...continued)

> abnormal individual is judged as if he were normal, ... to the extent, in short, that the defective person is judged as if he were someone else, the moral judgment underlying criminal conviction is undermined.... But this approach has its costs. [The] factors that call for mitigation under this doctrine are the very aspects of individual's personality that make us most fearful of his future conduct. In short, diminished responsibility brings formal guilt more closely into line with moral blameworthiness, but only at the cost of driving a wedge between dangerousness and social control.

Id. at 71.

[66] For a general discussion of the amendment, see Paul H. Robinson, The A.L.I.'s Proposed Distributive Principle of "Limiting Retributivism": Does It Mean In Practice Pure Desert?, 7 Buff. Crim. L. Rev. 3 (2004).

[67] See Part I.B supra.

blameworthy offenders, all other things being equal, any system that cared about tracking moral blameworthiness would want to take this criteria into account.

On the other hand, there may be practical limitations to broader application. In its current terms, the extreme emotional disturbance mitigation can operate only if there exists some lesser included offense to which the greater offense can be mitigated. Homicide, as the most serious offense, has such lesser offenses, such as manslaughter, readily available. Unfortunately, even modern criminal codes commonly lack such different grades within the same offense. But one could imagine efforts to construct non-homicide mitigations that would work in a analogous fashion. Property destruction might have several grades within that offense, perhaps designed to take account of the value of the property destroyed, and one of those lesser grades might be used as the mitigation grade.

However, a cleaner approach might be to simply adopt a general principle that grants a one grade reduction if the conditions of the mitigation are satisfied. (A decrease in one grade typically approximately halves the maximum punishment. If some lesser adjustment were desired, it could be specified.) Such an approach is already used in a variety of modern codes in the context of inchoate liability. An attempt to commit an offense is commonly graded as one grade less than the substantive offense attempted. Of course, this approach assumes that the code is built upon a system of fixed offense grades. This is true of all modern American criminal codes, but is not necessarily true in non-Model Penal Code jurisdictions.

If such a general principle of mitigation were not adopted in the criminal code, it could be adopted as a "general adjustment" within a sentencing guideline system. That is, a general principle would authorize a lower guideline sentence or a downward departure from the guideline sentence whenever the conditions of the mitigation are satisfied.[68]

To summarize, a criminal justice system that cares about matching the degree of liability and punishment to the degree of an offender's blameworthiness would want to recognize all three of the mitigations discussed here and would want those mitigations available in all cases and for all offenses in which the mitigating circumstances could arise. Certainly, their recognition is most important in the most serious offense, murder. While such mitigation might best be done through grading provisions of substantive criminal law, they could alternatively be applied by a general adjustment within sentencing guidelines.

IV. Conclusion

To is worth noting that the issues discussed here might, or might not, be of great importance. The extent of their importance depends upon the nature of a jurisdiction's sentencing system and the practical effects that follow from the determination of offense grade.

First, notice the limits of the exercise. These mitigations do not involve the critical assessment of determining whether there shall be liability or not. Nor do they typically determine the actual amount of punishment that will be imposed. They represent an intermediate – and often less critical – stage in which the offense grade is determined. At issue here commonly is

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[68] Compare this to the U.S.S.C. Guidelines §5H1.3, which expressly rejects "mental or emotional conditions" as relevant in determining whether a departure is warranted.

only which of two alternative offense grades is to apply – such as murder versus manslaughter – and the practical effect is simply to mark out one set of cases (the mitigated) in which the sentencing judge will have a limit on punishment that she will not have in the other set (the unmitigated). That admittedly can be an important effect, but it is not as critical as many other punishment decisions.

Also, notice that there is probably no magical point on the continuum of blameworthiness that marks off cases that should be given the mitigation from those that should not. If one imagines a continuum of blameworthiness from 1 to 100 on to which all cases will fit, the definition of the mitigation sets the point on that continuum that divides the range of cases into two groups, the mitigated and the unmitigated. It may be that there is no great reason to prefer a formulation that sets that point at 40 rather than at 60.[69] (The more important goal of drafters may be to avoid a formulation that denies a mitigation to cases at points 38 and 35 yet grants it to cases at points 42 and 45.)

Ultimately, the practical effect of the grading categorization is highly dependent upon the nature of the sentencing system in the jurisdiction. If the system has mandatory minimum sentences that attach to the offense grade, and if those mandatory minimums are high enough to be significant, then the grading assessment can be quite important. Indeed, if the higher grade offense, such as murder, carries a mandatory death sentence, then the grading decision is all important. In the U.S., at least, a mandatory death sentence is unconstitutional. (And relatively undemanding forms of the mitigation conditions at issue here are commonly included as mitigation factors in the formal death penalty decision process so as to preclude imposition of that penalty.[70])

On the other hand, if the only effect of the grade is to set a maximum sentence beyond which the sentencing judge may not go, as is commonly the case, then the distinction may have limited importance. This is especially true if the maximum sentence for the lower grade is sufficiently high that even many unmitigated cases would in practice be given sentences less than he lower grade's maximum. Further, if broad sentencing discretion is available, as it commonly is, the sentencing judge is likely to note and give deference to the mitigating circumstances even if the offender does not quality for a formal mitigation of offense grade. On the other hand, even in cases where the sentencing implications are limited, there may be other non-sentencing values in getting the offense grade right.[71] For example, a criminal justice system that wants to build

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[69] If one had a sufficiently sophisticated system, of course, it would be ideal to have the line drawn at that point where the deserved punishment of the mitigated killer matches the punishment that would be imposed upon a non-homicide offender of similar blameworthiness.

[70] See, e.g., Model Penal Code §210.6(4)(b)&(g) ("The murder was committed while the defendant was *under the influence of extreme mental or emotional disturbance*" or "At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was *impaired as a result of mental disease or defect or intoxication*").

[71] There exist a range of reasons, even beyond sentencing implications, for getting

(continued...)

moral credibility with the community, and thereby harness the powerful forces of social and normative influence,[72] would want to show that it perceives the important blameworthiness difference between cases of the unmitigated and mitigated case of intentional killings that the community perceives.

[71] (...continued)
offense grades right. See Paul H. Robinson et al., The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading, J. Crim. L. & Criminology [Part I] (forthcoming 2010).

[72] Paul H. Robinson & John M. Darley, Intuitions of Justice: Implications for Criminal Law and Justice Policy, 81 S. Cal. L. Rev. 1 (2007); Robinson, Distributive Principles, supra note 35, at ch 8; Robinson, Goodwin & Reisig, Disutility, supra note 35.